

REMARKS

Without acquiescing to the propriety of the rejections in the Office Action dated September 15, 2003, claims 1, 24, 26, 28, 34 and 40 have been amended. Entry of these amendments, reconsideration of the application, and allowance of all claims pending herein is respectfully requested in view of the remarks below, and the accompanying Request for Continued Examination. Claims 1-18, 21, 23-32, 34-36 and 40-41 are pending and under consideration.

Initially, Applicant notes that the present Office Action was made Final although it is a first Office Action in response to a Response filed with a Request for Continued Examination. Further, the Office Action alleges that the finality of the Office Action is proper because (1) all claims were drawn to the same invention claimed in the application prior to the entry of the Response filed with the Request for Continued Examination and (2) the claims could have been finally rejected on the grounds in the art of record in the next Office Action if they had been entered in the application prior to the entry of the Response filed with the Request for Continued Examination. Applicant respectfully submits that the finality of the present Office Action is improper at least due to (1) above. Specifically, the Response filed with the Request for Continued Examination included claim amendments which recited that the body configured to be attached to the hydrotherapy-tub included an opening through a wall of a tub such that the body covered the opening. Such recitation was not present in the claims pending prior to the Response filed with the RCE. Therefore, the claims filed with the Response filed with the Request for Continued Examination were not drawn to the same invention claimed in the application prior to such Response filed with the Request for Continued Examination. Because the invention was not the same before and after such amendment, it is respectfully submitted that the finality of the present Office Action is improper. MPEP § 706.07(b). Thus, Applicant respectfully requests that the finality of the Office Action dated September 15, 2003 be withdrawn and that the RCE fee included herewith be refunded to Applicant.

Election of Invention:

Applicant hereby affirms the election of Species I, claims 1-18, 21, 23-32, 34-36, 40 and 41, which was made in a telephone conversation with the Examiner on September 10, 2003.

Specification Objections:

The specification continues to be objected to as failing to provide proper antecedent basis for the claimed subject matter. Specifically, the language found in claims 18, 28 and 30 is alleged to not be present in the specification. Further, the “method” language in claims 34 and 40 could not allegedly be found in the specification.

Regarding claim 18, applicant respectfully reasserts that the language recited therein would be understood by one skilled in the art in view of the specification and drawings. Further, MPEP § 608.01(o) focuses on insuring that nomenclature introduced by applicants in amended claims is understood in light of the specification. The terms recited in claim 18 are understood from the specification without further amendment thereto. Specifically, it is easily understood that the first and second chamber are longitudinal, the hydrotherapy tub has an inner surface, the body is configured to close the first chamber and the second chamber to be located parallel to an inner surface of the tub, and the second chamber is configured to be located between the first chamber and the inner surface. There are no terms recited in this claim which would not be understood by one from reviewing the specification. In particular, there are no new terms introduced which would require that such terms being specifically tied to the previous description. For example, it would not be necessary to enclose specific references to the terms “longitudinal”, “parallel”, or “inner surface” to allow one skilled in the art to understand the subject matter as recited in this claim. Thus, it is respectfully submitted that this objection is overcome.

Regarding the allegation that “means for providing” in claims 28 and 30 does not include proper antecedent basis, it is respectfully submitted that such support is included in the

specification. As asserted previously, the specification clearly discloses a plurality of jets of water-air froth being provided to an interior of the hydrotherapy tub through water and air chambers, which receive water and air from water and air inlets thereof. For example, a plurality of streams of water-air forth is disclosed on page 6 of the specification while water and air chambers are described on pages 4 and 5 of the specification, among other locations. Thus, it is respectfully submitted that these claims do not include any terms which would not be understood by one skilled in the art. Therefore, it is believed that this objection is overcome.

Also, regarding the allegation that the “method” language in claims 34 and 40 could not be found in the specification, it is respectfully submitted that the specification and originally filed claims provide antecedent basis for such method claims. Specifically, a body mounted on a spa wall is described on page 4. An air inlet and water inlet is described on page 5. Further, a water-air froth is provided from a plurality of outlets as described on page 6. Thus, it is respectfully submitted that sufficient antecedent basis is present in the specification. Thus, it is believed that this objection is overcome.

§ 102 Rejections:

Claims 1-6, 10, 16-18, 21, 23-32, 34-36, 40 and 41 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Martin (U.S. Patent No. 1,982,260). The Office Action alleges that Martin discloses a body having a water inlet and an air inlet, means for providing a plurality of jets, a water chamber, an air chamber and a hydrotherapy tub. Further, the Office Action alleges that the language relating to the attachability of the system through the wall of a spa is functional and does not impose any patentably distinguishing structure over that disclosed by Martin.

Claim 1 of the present application recites a fluid flow system for a hydrotherapy tub which includes a body and a plurality of outlets. The body is configured to be attached to a hydrotherapy tub having an opening through a wall of the tub such that the body is stationary relative to the wall. The body further includes a first chamber and a second chamber. The first

chamber is configured to receive water through the opening in the wall and the second chamber is configured to receive air through the opening in the wall. The plurality of outlets is in fluid communication with the first chamber and the second chamber, and the outlets are configured to transmit water from the first chamber and air from the second chamber to an interior of the hydrotherapy tub.

Martin discloses an apparatus for insertion into a bathtub which is placed on an interior surface of the tub and receives fluid through conduits which pass through an interior fluid containing portion of the bathtub. Specifically, a water conduit appears to run to a water faucet mounted on an interior surface of the tub while an air conduit appears to exit the tub to allow ambient air to be passed therethrough. Also, Martin discloses an injection unit which is mounted for reciprocation in a frame and during movement of the injector unit, liquid is supplied to the nozzles as the nozzles travel along elongated slots, as described on page 2, lines 75-78 and 103-107, for example. During movement of the injector unit, a massage may be caused to progress up and down the arm of a patient to stimulate circulation thereof, as described on page 2, lines 115-120. As noted previously by the Examiner, the device disclosing Martin may also be embodied in permanent installations in hospitals and alike, but there is no indication in Martin such permanent installation would alleviate the need for movement of the injector unit to provide a massage to a patient. However, there is no disclosure in Martin of a body having a plurality of outlets wherein the body is stationary relative to a wall of a hydrotherapy-tub, as recited in claim 1 of the present application. Instead, as noted, the injector unit disclosed in Martin is movable to allow a massage to be provided to a patient and further must be movable to allow the injector unit to discharge water to the interior of the tub as described on page 2, lines 80-83, which describes a fluid operated motor for discharging water through outlets to an interior of a tub.

Therefore, because the features of claim 1 of the present application (e.g., a body having outlets stationary relative to a tub wall) are not identically disclosed in Martin, claim 1 cannot be anticipated thereby. The claims depending from claim 1 are believed to be allowable for these reasons and for their own additional features. Claim 24 recites a hydrotherapy tub which

incorporates the elements of claim 1. Thus, claim 24 is believed to be allowable for these reasons as are the claims depending from claim 24.

Claim 28 recites, *inter alia*, a body configured to be mounted to a hydrotherapy tub having an opening through a wall of the tub such that the body is stationary relative to the wall. A water and an air inlet are configured to receive water and air, respectively, through the opening in the wall. Further included is means for providing a plurality of jets of water-air froth to an interior of the tub. As described above, Martin does not disclose a body configured to be mounted to a hydrotherapy tub such that the body is stationary relative to a wall of the tub. Therefore, because the elements of claim 28 are not identically disclosed by Martin, it is respectfully submitted that this claim is allowable along with the claims depending therefrom. Claims 34 and 40 are believed to be allowable for the same reasons. Claims 35, 36, and 41 are believed to be allowable for the same reasons as their base independent claims and for their own additional features.

As asserted previously regarding the allegation that the language “configured to be attached” in claim 1 is functional and does not impose any patentably distinguishing structure over Martin, it is respectfully submitted that a functional limitation is one, which attempts to “define something ... by what it does rather than what it is ...” *In re: Swinehart*, 439 F.2d 210, 169 U.S.P.Q. 226 (C.C.P.A. 1971), M.P.E.P. § 2173.05(g). The recitation of the configuration of the body to be attached to a wall of the hydrotherapy tub defines the body by what it is (i.e., configured to be attached), not by what it does (i.e., discharge water and/or air).

Moreover, even if the phrase “configured to be attached” was functional, the use of such functional language does not by itself render a claim improper. *Id.*, MPEP § 2173.05(g) and 2114. Instead, any such functional language must merely satisfy § 112 which requires that the claim be adequately supported by the specification and that it be precise and definite. *Id.* The Office Action alleges that the configuration of the body to be attached to a hydrotherapy tub does not appear to impose any patentably distinguishing structure over that disclosed by Martin. However, claim 1 further includes other limitations which in conjunction with the recitation of “configured to be attached” provide definiteness thereto. The “configuration” of the body must

be read with the remainder of the claim such that the device is configured to be attached in a manner such that the body is stationary relative to a wall of the tub and wherein a first and second chamber of the device are configured to receive water through the opening in the wall. Martin does not disclose such a configuration. It is respectfully submitted that the use of the phrase "configured to be attached" in claim 1 when read with the remainder of the claim provide definiteness and is not overbroad, thus satisfying § 112. Therefore, it is believed that this claim is proper under § 112 and further that it patentably distinguishes over the cited prior art and is allowable. Moreover, claim 28 is believed to be proper for the same reasons and is also believed to be allowable.

§ 103 Rejections:

Claims 1-10, 16-18, 21, 23-32, 34-36, 40 and 41 stand rejected under 35 U.S.C. § 103(a) as being obvious over Martin in view of Gardenier et al. (U.S. Patent No. 6,182,203). Specifically, it is alleged that Gardenier et al. discloses an opening through a tub wall and it would be obvious to associate an opening with the Martin tub wall in order to provide a more permanent system, as contemplated in pages 4 and 5 of Martin.

Pages 4 and 5 of Martin disclose that a bathtub may be embodied in permanent installations in hospitals and the like. It is respectfully submitted that the possibility of incorporating the Martin device into a permanent installation would not provide the motivation to combine Martin with Gardenier et al., nor a suggestion nor motivation to provide a body having outlets, which is stationary relative to a wall of the hydrotherapy-tub. In fact, it is respectfully submitted that it is only through impermissible hindsight reasoning that Gardenier et al. and Martin have been combined to allegedly make the claims obvious.

The cited language relating to making a device permanent does not provide any suggestion or motivation to mount the device through a wall of the tub nor a suggestion to mount it stationary relative to a wall of the tub. In fact, page 1, column 1 of Martin discloses that it is desirable that the device is movable such that a massage may be caused to progress from one part

of the body to another. Further, column 1 discloses that it is undesirable for any region of application of a massage to be fixed, since it is then necessary to adjust the apparatus or move the patient to massage other portions of the body. It is also stated that the object of the invention in Martin is to movably apply a massage to the body whereby a region of application of the massage is caused to progress from one part of the body to another.

When such description is combined with the suggestion to embody the device in permanent installations in hospitals and the like, it appears that the permanence of such an installation may relate to the type of materials used, permanent connection of the conduit to the water faucet, or other unknown advantages, but it would not relate to fixedly mounting such a device to a wall of a tub such that it would be stationary thereto, since this would be in contrast to the desired goals of the movability of such a device relative to various portions of a user's body. Specifically, if the device in Martin was mounted to a spa wall as in Gardenier et al., i.e., such that it was stationary as is the device disclosed therein, it would not achieve the stated objectives (i.e., because it would be immobile), and would thus be unsatisfactory for its intended purpose. Further, as described on page 2, lines 103-120, for example, the movement of the injector unit causes the discharge of the fluid therethrough, and thus if the injector unit was made stationary relative to a wall of a hydrotherapy-tub, the injector unit would not function as intended to discharge such water. Therefore, it is respectfully submitted that there is no suggestion or motivation which would cause one skilled in the art to combine the Martin and Gardenier et al. references. Accordingly, these references cannot make the claims of the present application obvious and this rejection is believed to be overcome.

Claims 11-15 stand rejected under 35 U.S.C. § 103(a) as being obvious over Martin and Guiler. Guiler is alleged to disclose conical structures which would be obvious to incorporate into the Martin device to arrive at the subject matter of the referenced claims. As noted previously, because these rejections rely on the §102 application to Martin, these claims are believed to be allowable for the same reasons as claim 1 along with the additional features of the conical structures. Therefore, these claims are believed to be allowable.

CONCLUSION


It is believed that the application is in condition for allowance, and such action is respectfully requested.

Applicant respectfully requests that the finality of the Office Action dated September 15, 2003 be withdrawn and that the RCE fee included herewith be refunded to Applicant.

If a telephone conference would be of assistance in advancing prosecution of the subject application, Applicant's undersigned attorney invites the Examiner to telephone him at the number provided.

Respectfully submitted,

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Victor A. Cardona, Esq.
Attorney for Applicant
Registration No. 44,589

HESLIN ROTHENBERG FARLEY & MESITI P.C.
5 Columbia Circle
Albany, New York 12203
Telephone: (518) 452-5600
Facsimile: (518) 452-5579